

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002



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Date: 02/17/99

Case No. **98-INA-0028**

In the Matter of:

R-TECH CONSULTANTS, INC., Employer,

on behalf of

RAVINDRA K. AHUJA, Alien.

Certifying Officer: R. M. Day, Region IX.

Appearance : A. K. Klein, Esq., of Los Angeles, California, for Employer and Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of RAVINDRA K. AHUJA ("Alien") by R-TECH CONSULTANTS, INC., (the "Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On December 27, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Financial Analyst" for its Business Development, Employee Benefit, and Manufacturing business. The position was classified as "Accountant, Budget" under Occupational Code No. 160.162-022² of the DOT.³ The Employer described the job duties as follows:

Interpretation and analysis of various types of financial records. Will perform case flow analysis, capital expenditure analysis, forecast of budgets for new and existing projected. Will be involved in analyzing and estimating the risk and potential returns of new ventures including the development of a manufacturing plant in India.

AF 292 at Item 13. (Copied verbatim without change or correction.) The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was a baccalaureate degree with a major in Management or Finance. The experience requirement was three years in the Job Offered or three years in the Related Occupation of Business Management. *Id.*, box 14. The Other Special Requirements were

Knowledge of generally accepted Indian Accounting and Financial methodologies and practices.

² **160.162-022 ACCOUNTANT, BUDGET** (profess. & kin.) Applies principles of accounting to analyze past and present financial operations and estimates future revenues and expenditures to prepare budget: Analyzes records of present and past operations, trends and costs, estimated and realized revenues, administrative commitments, and obligations incurred to project future revenues and expenses, using computer. Documents revenues and expenditures expected and submits to management. Maintains budgeting systems which provide control of expenditures made to carry out activities, such as advertising and marketing, production, maintenance, or to project activities, such as construction of buildings. Advises management on matters, such as effective use of resources and assumptions underlying budget forecasts. Interprets budgets to management. May develop and install manual or computer-based budgeting system. May assist in financial analysis of legislative projects to develop capital improvement budget and be designated Program Analyst (government ser.). May assist communities to develop budget and efficient use of funds and be designated Public Finance Specialist (government ser.) GOE: 11.06.01 STRENGTH: S GED: R5 M5 L5 SVP: 8 DLU: 89

³ Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

Id., at box 15.⁴

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated November 8, 1996. AF 289. (1) Citing 20 CFR § 656.21(b)(2)(i)(A) and referring to the requirement of a "knowledge of generally accepted Indian Accounting and Financial methodologies and practices," found that the Employer's job requirements were neither incorporated in the DOT job description or customary to the occupation. As such the Employer's hiring criteria were not normally required for the successful performance of the work of a Budget Accountant in the United States and were unduly restrictive. Employer was instructed either to delete the restrictive job requirement and retest the labor market or to justify it based on business necessity.⁵

Rebuttal. The Employer's December 12, 1996, rebuttal consisted of an argument by counsel (AF 156-167),⁶ a statement by its President, supporting statements (AF 172-201), and excerpts from books and other publications (202-290). Presenting evidence as to the differences between accounting practices in India and in the United States, the Employer asserted that it had a subsidiary in India, where it was continuing to do business with United States and Indian companies. Contending that its special knowledge requirements bore a reasonable relationship to this occupation, the Employer argued, "In this case the requirement of knowledge of generally accepted Indian Accounting and Financial methodologies and practices bears a reasonable relationship to the occupation of Financial Analyst in the context that a US Company performing business activities in India must be able to financially interpret and analyze financial statements and accounting documents prepared by joint venture and Indian businesses." In addressing its rejection of the U. S. applicant, Employer argued that "[S]he does not have any knowledge of

⁴The hours were 8:00 to 6:00 in a forty hour week at \$3,000 per month with no overtime. The worker would not supervise any employees. The Alien, who was born in 1960, is a national of India and is living in Los Angeles, California. In 1982 she completed a baccalaureate degree in "Commerce" in Financial Accounting/ Management. From October 1980 to April 1989 she worked as a Managing Partner in a Bombay firm engaged in a "freight/forwarding/consolidation/housing" business. She was unemployed from April 1989 to October 1990. She was Assistant Manager of a restaurant in Los Angeles from October 1990 to February 1991, and was unemployed until March 1992, when she was hired by the Employer. From March 1992 to the date of application the Alien's duties while employed by the Employer were substantially identical to those listed in the position description in ETA Form 750A, the Application, except that ETA Form 750B did not indicate that her work included the development of a manufacturing plant in India or that it required knowledge of generally accepted Indian Accounting and Financial methodologies and practices. The file did not indicate whether she has visa status permitting such employment in the United States.

⁵ Three applications for this job were received. The Employer did not hire any U. S. worker for the reasons stated in AF 380-384. Citing 20 CFR § 656.24(b)(2)(ii) the CO also found that the Employer had failed to hire an apparently qualified U.S. worker without providing a sufficient statement of lawful job-related reasons for their rejection. This reason was not considered in the Final Determination, however, and will not be discussed further for that reason.

⁶ Assertions by an employer's attorney that are not supported by underlying statements by persons with knowledge of the facts do not constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991); **Mr. and Mrs. Elias Ruiz**, 90 INA 425 (Dec. 9, 1991); **Personnel Services, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr. Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990).

what it takes to analyze Indian Accounting, Finance, or Tax Laws" and that she did not satisfy the job's core requirements for this reason. Addressing the violation of 20 CFR § 656.21(b)(2)(i)(A). Employer argued that its job requirements "are those normally required for this position and are not unduly restrictive," contending that they arise from business necessity.

Final Determination. On January 9, 1997, the CO denied certification in the Final Determination. AF 153-155. The CO based this conclusion on the NOF finding that the Employer's job requirements were unduly restrictive under 20 CFR § 656.21(b)(1)(A) because this occupation normally does not require knowledge of Indian Accounting and Financial methodologies and practices for the successful performance of the job in the United States. Addressing the Employer's argument that this restrictive requirement could not be separated from the job duties the Financial Analyst performs, the CO said the Employer offered no true or substantial documentation to back up its claims. Concluding that the Employer failed to rebut the NOF, the CO explained that, "No evidence was submitted to support the employer's assertion that (knowledge of generally accepted Indian Accounting and Financial methodologies and practices) are in conformance to Generally Acceptable Accounting Principles, GAAP."

Appeal. After certification was denied on February 12, 1997, the Employer requested review of the Final Determination. AF 01-152. Employer argued that Indian accounting "methodologies and practices" are substantially different from Generally Acceptable Accounting Principles and resubmitted exhibits filed in its rebuttal. Evidence first submitted with the request for review will not be considered by the Board. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). To the extent the attachments Employer proffered contain evidence that was not in the record before the CO, such exhibits are not a part of the Appellate File that the panel may consider under 20 CFR § 656.26(b)(4). **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar. 13, 1989); also see **Modular Container Systems, Inc.**, 89 INA 228 (Jul. 16, 1991)(*en banc*); **Yaron Development Co.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).

Discussion

Burden of proof. Alien labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived need for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, such as this Employer. Because the Employer's application seeks an exception to the Act's broad limits on immigration into the United States, the Panel will apply the Act and regulations to the Alien's entitlement to labor certification under the well-established principle that statutes granting exemptions from their general operation must be strictly construed, and that any doubt must be resolved against the party invoking such an exemption from a statute's general operation. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). It follows that in pursuing alien labor certification, the

applicable law required that the Employer and not the CO must carry the burden of proof as to all of the issues arising under this application for relief pursuant to the Act and regulations.⁷

Business necessity. While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(i)(A), a regulation adopted to implement the relief granted by the Act, which provides that,

The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements[.] The job opportunity's requirements, unless adequately documented as arising from business necessity, ... [s]hall be those normally required for the job in the United States.

The Employer's need for a budget accountant for the interpretation and analysis of various types of financial records was entirely conventional, as was the statement that the worker would perform case flow analysis, capital expenditure analysis, forecast of budgets for new and existing projects. It was only in the provision that the employee would "be involved in analyzing and estimating the risk and potential returns of new ventures including the development of a manufacturing plant in India" that Employer suggested that any part of the job related to Indian accounting practices. The application also indicated that the Employer contemplated no more than a single plant in India for development as one of a number of "new ventures." Consequently, the breadth of the Special Requirement for "knowledge of generally accepted Indian Accounting and Financial methodologies and practices" is materially inconsistent with the job description, which it rendered misleading in the context of this application.

In response to the NOF direction that it establish the business necessity of this Special Requirement, the Employer's rebuttal presented a plethora of opinions that "knowledge of generally accepted Indian Accounting and Financial methodologies and practices" is important for an accountant working in India. As this job is in the United States and not in India, it is relevant that the Employer's evidence failed to disclose the nature and the proportion of its business that required the specialized knowledge to which these opinions applied.⁸ The Employer's application

⁷"Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

⁸ See *Gerata Systems America*, 88 INA 344 (Dec. 16, 1988).

suggested that it was engaged in some form of business expansion that would require the assumption that the new business that it planned to develop would justify the addition of an employee with such specialized skills to its staff. As the evidence did not offer a business plan or address the extent of its need in proving the business necessity of the restrictive requirement the rebuttal is vague and non-specific. The importance of this defect is apparent when the Panel considers **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), an authority cited by the Employer's argument. While **Information Industries** addressed the proof of business necessity of a foreign language requirement, the same standards of proof are relevant for this Special Requirement. Speaking *en banc* in **Information Industries**, the Board required an employer to establish that (1) the special requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the skills specially required is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, specific facts must be produced to show the scope or volume of employer's business that involves the specially required skill. This is expressed in terms of the proportion of its business transactions that involve the use of such expertise. This may be demonstrated with proof as to (1) nature and identity of the business dealings that cannot be carried out without the use of the skill specified and (2) the percentage of the employer's business that involves such expertise.

In this case, the second prong invites evidence that the employee would actually use this skill while performing specific job duties in that part of its business that is located in the United States. Both prongs of the **Information Industries** test must be met. Simply proving that a significant percentage of the employer's business involves the required skill is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the use of that skill and the job to be performed by the worker in this position in Employer's offices in the United States. The affected share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). Business necessity is not proven under the first prong where the percentage of transactions requiring the skill is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*).

Summary. Although the Employer ostensibly complied with the NOF directions to file evidence supporting its position on the issues raised in this case, the facts sought were not proven by the Employer's assertions, which were limited to general statements that appeared unconnected with tangible data. Moreover, the Employer's proof failed to demonstrate a frequent and constant need for the specialized skills demanded in this hiring criterion.⁹ After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because Employer's proof presented only general statements about its business and consequently was vague and incomplete. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991). As it did not provide the objective data needed to prove business necessity, the Employer failed to demonstrate that "knowledge of generally accepted Indian Accounting and

⁹ Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*).

Financial methodologies and practices" was vital to the work discussed in the DOT description of the job duties of this position or that it was a necessary part of the usual work to be performed in this position.

Employer failed to sustain its burden of proving that the employee would "be involved in analyzing and estimating the risk and potential returns of the new ventures," as such "new ventures" were not specific identified in terms of the work to be performed in this job. Moreover, the application's passing reference to the "development of a manufacturing plant in India" was subordinated to the general duties of this position, the Employer appears to have minimized its need for the expertise described in its Special Requirement. Consequently, its emphasis on the critical nature of such skills in the rebuttal evidence was inconsistent with quotidian Job Duties generally described in its application.

For these reasons the Panel concludes that the CO's denial of alien labor certification was supported by the evidence of record and should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 98-INA-0028

R-TECH CONSULTANTS, INC., *Employer,*
RAVINDRA K. AHUJA, *Alien.*

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:	:
	:	CONCUR	:	DISSENT	:
	:	:	:	COMMENT	:
Lawson	:	:	:	:	:
	:	:	:	:	:
Huddleston	:	:	:	:	:
	:	:	:	:	:

Thank you,

Judge Neusner

Date: October 22, 1998